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October 5, 2017

**VIA ECFS**

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re:** ***Restoring Internet Freedom*, WC Docket No. 17-108; *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 17-199**

Dear Ms. Dortch:

On behalf of NCTA – The Internet & Television Association ("NCTA"), we write in response to certain erroneous claims made in INCOMPAS's reply comments and in the supporting declaration by Dr. David S. Evans regarding the broadband marketplace and broadband providers' purported incentives to act anticompetitively.[1] As set forth in detail below, these assertions conflict with the weight of the evidence in the record and present no hurdle to restoring a Title I classification for broadband.

## 1. Erroneous Arguments about Broadband Market Structure and Competition

INCOMPAS's economic assertions rest on the premise that there is minimal competition in the broadband marketplace and that consumers cannot switch providers easily.[2] As support, INCOMPAS cites the paper by Dr. Evans, who in turn relies heavily on past assertions in Commission orders—such as in the order approving the merger of Charter Communications, Time Warner Cable, and Bright House Networks and assertions in previous open Internet rulemakings—to reach various "conclusions" about the structure of the broadband marketplace and large broadband providers' alleged market power. These conclusions, however, do not stand up to close scrutiny.

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[1] *See* Reply Comments of INCOMPAS, WC Docket No. 17-108 (filed Aug. 30, 2017) ("INCOMPAS Reply Comments"); David S. Evans, *Economic Findings Concerning the State of Competition for Wired Broadband Provision to U.S. Households and Edge Providers* ("Evans Paper"), attached as Exhibit B to INCOMPAS Reply Comments.

[2] INCOMPAS Reply Comments at 24-30.

As an initial matter, it is highly questionable whether the past assertions Dr. Evans cites were accurate at the time they were articulated. For starters, "at no point in the [*Title II*] *Order* was reference made to any market failure to justify imposing regulations."[3] And, to the extent the Commission obliquely "invoked a kind of 'market-power-lite'" theory in that *Order*,[4] that theory has been roundly criticized by sitting Commissioners in many proceedings. Commissioner O'Rielly characterized the Commission's economic analysis as "nonsense."[5] Then-Commissioner Pai concluded that the Commission was acting as "a rubber stamp for *political*"—not economic—"decisions made by the White House."[6] Moreover, the Commission's chief economist at the time famously labeled the proceedings an "economics-free zone."[7] And the dissenting judge in *USTelecom* pointedly noted that "many of the Commission's policy arguments assert what sound like claims of market power, but without going through any of the fact-gathering or analysis needed to sustain such claims."[8]

The same defects afflict the other materials on which Dr. Evans relies.[9] For example, Dr. Evans highlights selective portions of past DOJ competitive impact statements regarding

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[3] Gerald R. Faulhaber & Hal Singer, *The Curious Absence of Economic Analysis at the Federal Communications Commission: An Agency in Search of a Mission* at 39, attached to Comments of CALinnovates, WC Docket No. 16-106 (filed July 10, 2016).

[4] *USTelecom v. FCC*, 825 F.3d 674, 766 (D.C. Cir. 2016) (Williams, J., dissenting in part).

[5] *See Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5979 (2015) ("*Title II Order*") (Statement of Commissioner O'Rielly, dissenting).

[6] *Id.* at 5935 (Statement of Commissioner Pai, dissenting) (emphasis added).

[7] L. Gordon Crovitz, *Economics-Free Obamanet*, WALL ST. J., Jan. 31, 2016, *available at* https://www.wsj.com/articles/economics-free-obamanet-1454282427.

[8] *USTelecom*, 825 F.3d at 750 (Williams, J., dissenting in part). Indeed, if the FCC *really* found the market failures that Dr. Evans alleges, it would not have commenced its regulation of broadband providers by purporting to forbear from much of Title II regulation (even if only temporarily so). *Cf. id.* at 773-74, 777 (Williams, J., dissenting in part) (concluding that the FCC's decision to forbear reflected an "assum[ption] [of] sufficient competition").

[9] *See Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 31 FCC Rcd 6327, 6670 (2016) ("*Charter-TWC Merger Order*") (Statement of Commissioner Pai, dissenting) (characterizing the merger analysis as "fact-free, dilatory, [and] politically motivated"); *id.* at 6673 (Statement of Commissioner O'Rielly, dissenting in part) (referring to the Commission's economic analysis as an "exercise to use transactions as vehicles to accomplish policy goals that [the Commission] could not achieve through rulemakings alone"); *Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 30 FCC Rcd 9131, 9367 (2015) (Statement of Commissioner Pai, dissenting in part) ("[T]he only detailed economic analysis and econometric modeling in the record . . . points to [an] opposite conclusion" from the one the Commission adopted); *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, 18052 (2010) ("*2010 Open Internet Order*") (Statement of Commissioner McDowell, dissenting) ("Every time the government has examined the broadband market, its experts have concluded that no evidence of concentrations or abuses of market power exists."); *id.* at 18087 (Statement

broadband providers' supposedly hostile reactions to the emergence of online video distributors ("OVDs") without acknowledging that DOJ recognized that broadband providers have also responded to these developments in a *pro*-competitive fashion, "introduc[ing] new and less expensive packages[,] . . . increas[ing] the amount of content available on an on-demand basis, and ma[king] content available to subscribers on devices other than traditional cable set-top boxes."[10] Moreover, as discussed further below, far from seeking to foreclose OVDs or to raise their costs, cable broadband providers have strongly embraced OVD offerings by promoting the value they deliver to broadband subscribers and by integrating such online offerings with their own video services.[11]

In any event, the record in *this* proceeding makes plain that competition in the broadband marketplace today is more robust and dynamic than ever—and puts to rest any notion that broadband providers have market power that can be leveraged anticompetitively. Arguing to the contrary, Dr. Evans contends that (1) "[t]here is little competition in the supply of high-speed wired [broadband]," (2) "[w]ireless, and fixed satellite . . . do not impose significant competitive constraints," and (3) accordingly, "[s]everal large wired [broadband] providers . . . have significant bargaining leverage over edge providers."[12] Yet the record before the Commission undermines each of these assertions.

On his first claim, Dr. Evans can only assert that there is little competition for fixed broadband by indulging in the fiction that the market is limited to connections with 25/3 Mbps speeds.[13] Dr. Evans overlooks the fact that the *2015 Broadband Progress Report* adopted the 25/3 Mbps threshold for the limited purpose of assessing the availability of "advanced telecommunications capability," without undertaking any analysis of substitutability as would be required to define a product market; in fact, the Commission made clear that the 25/3 threshold was *not* intended to serve as a proxy for defining the broadband market in other contexts.[14]

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of Commissioner Baker, dissenting) ("The majority sidesteps our own analysis that demonstrates that competition is strong and growing.").

[10] *See United States v. Charter Corp. et al.*, 1:11-cv-00759, Competitive Impact Statement 10 (D.D.C. Jan. 18, 2011). In addition, the principal "DOJ" document on which Dr. Evans relies (Nicholas Hill *et al.*, "Economics at the Antitrust Division 2014-2015: Comcast/Time Warner Cable and Applied Materials/Tokyo Electron" (Nov. 4, 2015)), is in fact an external staff publication. Of course, it is axiomatic that "an agency is not bound by the actions"—much less external articles—"of its staff if the agency has not endorsed those actions." *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008) (quotations omitted).

[11] *See infra* at 9-10 & nn. 54-57.

[12] Evans Paper at 4-5.

[13] *Id.* at 12-14 & n.44.

[14] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2015 Broadband Progress Report, 30 FCC Rcd 1375 ¶ 1 n.1 (2015); *see also id.* at ¶ 3 (reflecting that the 25/3 Mbps threshold was designed with an eye toward a "family household[]" with more than four users).

Consistent with that proviso, the Commission has established a 10/1 Mbps threshold for use in other contexts,[15] making clear that "broadband" speeds include those lower than 25/3 Mbps. Dr. Evans conveniently disregards the fact that broadband providers offering speeds below 25/3 often compete vigorously (on price and other factors) with providers offering speeds meeting that threshold. Indeed, as Dr. Christian Dippon has explained, "this sort of binary and seemingly random classification" of broadband premised on a 25/3 Mbps threshold "artificially truncates the true boundaries of competition."[16] Dr. Dippon further explained that "[i]t is a fundamental economic principle that competition occurs on the margins," and "[f]or many people, 10 Mbps service, or even 3 Mbps, is more than adequate."[17] Leading edge providers have underscored this point in their product marketing.[18]

Dr. Evans similarly misses the mark with his assertion that wireless and satellite providers do not even partially constrain wired broadband providers. Most fundamentally, he improperly takes a static view of the quintessentially dynamic wireless marketplace, implicitly assuming that the state of technological development today is etched in stone. But even on Dr. Evans's terms, the record supports the conclusion that, for certain customers, wireless technologies *today* can offer an attractive alternative to wireline offerings. As Drs. Mark Israel, Allan Shampine, and Thomas Stemwedel have noted, most wireless offerings today have speeds well in excess of 10 Mbps, which contributes to the intermodal competition Dr. Evans believes is lacking.[19] Dr. Dippon has likewise explained that "wireline and wireless serve as partial substitutes," and, thus, "the actions of wireline companies . . . influence wireless companies and vice versa."[20] And, as Dr. Bruce Owen and others have explained, "[a]s more spectrum and new modulation methods (5G) become available, wireless carriers will become increasingly

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[15] *See Connect America Fund*, Report and Order, 29 FCC Rcd 15644 ¶¶ 15-29 (2014).

[16] *See* Christian M. Dippon, *Public Interest Repercussions in Repealing Utility-Style Title II Regulation and Reapplying Light-Touch Regulation to Internet Services*, 10 ("Dippon White Paper"), attached as Appendix C to Comments of Comcast Corp., WC Docket No. 17-108 (filed July 17, 2017) ("Comcast Comments"); *see also USTelecom*, 825 F.3d at 751 (Williams, J., dissenting in part) ("The Commission emphasizes how few people have access to 25 Mbps, but that criterion is not grounded in any economic analysis. . . . A likely explanation for why there has not been more rollout of higher speeds is that many people are reluctant to pay the price for it.").

[17] Dippon White Paper at 10.

[18] *See* Netflix, "Internet Connection Speed Recommendations," https://help.netflix.com/en/node/306 (last visited Oct. 5, 2017) ("Netflix Speed Recommendations") (representing that 5.0 Mbps speed is "[r]ecommended for HD quality" streaming).

[19] Declaration of Mark A. Israel, Allan L. Shampine & Thomas A. Stemwedel, at ¶ 37 ("Israel Declaration"), attached to Comments of AT&T Services Inc., WC Docket No. 17-108 (filed July 17, 2017) ("AT&T Comments"); *see also Title II Order*, 30 FCC Rcd at 5959 (Statement of Commissioner Ajit Pai, dissenting) (observing that because "98% of Americans now live in areas covered by 4G LTE networks" there is robust "intermodal competition" in the broadband market).

[20] Dippon White Paper at 14.

formidable competitors in local broadband markets."[21] Wireless providers themselves seem to agree; in particular, they note that 5G will greatly strengthen their ability to compete with fixed broadband services.[22] The record also demonstrates that the same dynamism applies to satellite broadband services. "[S]atellite broadband speeds are continuing to improve and new technologies are garnering substantial investor interest from major players."[23] In sum, the record reflects that wireless and satellite providers *do* compete with wired broadband providers and that such competition will only increase.

Dr. Evans's failure to acknowledge the dynamic nature of the broadband marketplace likewise results in his failing to account for "competitive entry and expansion" by recent and potential entrants that have "the resources to ramp up [their] competitiveness" in new areas and thus further "discipline . . . the marketplace."[24] For example, providers such as Google that have already deployed extensive fiber networks and are exploring new wireless offerings "may be only a relatively small innovation away from being able to compete nationwide quite quickly."[25] Moreover, "DSL technology," which already is "capable of attaining speeds comparable to cable and fiber technologies,"[26] and thus offers substantial competition in many areas,[27] is improving to the point of bringing greater competitive pressure to bear in the higher-speed segments of the market. Indeed, just this summer, AT&T announced its plan to use G.fast technology—a type of

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[21] Bruce M. Owen, *Internet Service Providers as Common Carriers: Economic Policy Issues*, 7 n.8 ("Owen Paper"), attached as Appendix A to Comments of NCTA – The Internet & Television Association, WC Docket No. 17-108 (filed July 17, 2017) ("NCTA Comments"); Israel Declaration at ¶ 17 ("[W]ireless and wireline services are rapidly converging . . . . This convergence will only increase, with further expansion in the importance of wireless offerings as full substitutes for wireline Internet Access.").

[22] *See* David McAtee, AT&T Senior Executive Vice President and General Counsel, "When Disruption Spurs Innovation and Investment," Press Release, (Oct. 24, 2016), http://about.att.com/newsroom/when_disruption_spurs_innovation_and_investment.html (asserting "ultra-fast 5G wireless networks" will enable wireless providers to "compete head-to-head with the broadband offerings of . . . cable companies").

[23] Dippon White Paper at 10-11.

[24] *Id.* at 9-10.

[25] *Id.* at 9.

[26] FCC, *2016 Measuring Broadband America Fixed Broadband Report* 8 (Dec. 1, 2016).

[27] *See, e.g.*, Netflix Speed Recommendations (making clear that DSL speeds are sufficient to support "HD quality" streaming). For an Internet-related discussion of how dynamic markets (such as broadband) require different analysis than static markets, *see* Gary Becker, THE BECKER-POSNER BLOG, *Dynamic Competition and Anti Trust Policy* (Sept. 2, 2013), *available at* http://www.becker-posner-blog.com/page/5/.

upgraded DSL technology—to offer initial speeds up to 500 Mbps to multiple dwelling units in 22 metro areas outside of its existing wireline footprint.[28]

Dr. Evans also cites scattered Commission assertions that there may be "switching costs" for fixed broadband that purportedly bestow a kind of market power regardless of robust competition.[29] But such claims are undermined by record evidence and by prior Commission analyses and reports. Recent consumer survey data indicate that "consumers switch broadband providers frequently, with 17.6 percent switching in the prior 12 months, 33.1 percent switching in the prior 2 years, and 49.4 percent switching in the prior 4 years."[30] Another survey showed that "71 percent of respondents said they would switch to a competing service if their [broadband provider] started to block or charge extra to use high-bandwidth [I]nternet services."[31] The Commission itself has recognized robust broadband provider switching in the past; in 2010 it found that "36 percent of Internet users had" switched broadband providers in the past three years, including to obtain better speeds, a better bundle of services, or additional features such as added email accounts or online storage.[32] "This significant rate of switching due to non-price factors highlights that consumers are well-informed about the quality attributes, and are sensitive to quality differences between providers."[33] Economists also have concluded that "customer switching costs from one Internet access provider to another are no more onerous than the costs of switching" in such other competitive markets as between "one brand of personal computer, tablet, or cell phone to another."[34] And, of course, many users toggle between fixed and mobile platforms many times over the course of a *single day*.

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[28] AT&T, *AT&T's G.fast on Sale now to Apartment and Condominium Properties in 22 Metros Across the U.S.* (Aug. 22, 2017), *available at* http://www.prnewswire.com/news-releases/atts-gfast-on-sale-now-to-apartment-and-condominium-properties-in-22-metros-across-the-us-300507683.html.

[29] Evans Paper at 12 (citing *2010 Open Internet Order* at ¶ 34; *Charter-TWC Merger Order* at ¶ 111).

[30] Andres V. Lerner & Janusz A. Ordover, *An Economic Analysis of Title II Regulation of Broadband Internet Access Providers*, ¶ 69 ("Lerner/Ordover Paper"), attached as Exhibit A to Comments of Verizon, WC Docket No. 17-708 (filed July 17, 2017) ("Verizon Comments").

[31] *Id.* at ¶ 70.

[32] FCC, *Broadband Decisions: What Drives Consumers to Switch – or stick with – their Broadband Internet Provider* at 2, 9 (FCC Working Paper, Dec. 2010).

[33] Lerner/Ordover Paper at ¶ 70.

[34] Owen Paper at 7 n.8; *see also* Dippon White Paper at 15-16 ("[M]any customers switch [broadband] providers regularly in response to various promotions and offers. . . . The heavy national and regional advertising that [broadband] providers (both wireless and wireline) do would make little sense otherwise."); *see also id.* (recounting survey evidence indicating frequent switching); Israel Declaration at ¶ 49 ("The ability to switch fixed access providers is demonstrated by the fact that churn is an important strategic focus in the broadband Internet access industry."); *see also id.* at ¶ 50 (recounting survey evidence indicating "a third of customers surveyed" in one year had "asked for discounts" with the implicit threat of switching if unsuccessful).

Dr. Evans contends that the "aggressive win-back techniques" broadband providers employ when consumers threaten cancellation is further evidence of high switching costs,[35] but the truth is in fact the complete opposite. "[T]he mere threat of switching often forces providers to reduce prices or improve offerings to retain customers."[36] Dr. Evans's theory has no explanation for this phenomenon; broadband providers would have no economic justification for devoting substantial resources to retention and win-back efforts if customers seldom switched providers.[37]

INCOMPAS and Dr. Evans build on these flawed premises in further contending that broadband providers are "gatekeepers"—a reproduction of the inapposite "terminating access monopoly" characterization.[38] The record demonstrates that this "construct is incoherent in the broadband context."[39] As Dr. Israel and his colleagues have emphasized, "[n]ot only are there no regulatory distortions to create terminating access monopoly concerns in broadband Internet access, but industry participants do not appear to behave as though broadband providers or firms in analogous situations have terminating access monopolies."[40] To the contrary, "broadband Internet service providers frequently pay backbone providers for transit, effectively paying to *enable* their own customers' access to content."[41] And Drs. Andres Lerner and Janusz Ordover have explained at length the inapplicability of the gatekeeper concept to the broadband market, including why a comparison to LECs is unwarranted:

> In the context of long-distance voice services, the area to which the "gatekeeper" theory has traditionally been applied, local exchange carriers ("LECs") were claimed to be "terminating access monopolies" because long-distance carriers (known as "inter-exchange carriers" or "IXCs") required access to the LEC's network to reach the LEC's customers. In this market setting, there were no effective market constraints on the ability of LECs to impose high termination fees on IXCs for termination of long-distance calls. A LEC could charge the IXC a high price to reach its customer and, because the IXC provided no service to and had no relationship with the end user on the terminating end, there was no

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[35] Evans Paper at 12.

[36] Israel Declaration at ¶ 16.

[37] Dr. Evans also relies on some particularly stale data, including orders and statements that precede the *previous* open Internet proceeding, *see* Evans Paper at 11-12, nn. 15, 16, 18, to support his switching arguments. But the Commission plainly should rely on more recent and reliable evidence reflecting the evolving state of the dynamic broadband marketplace.

[38] INCOMPAS Reply Comments at 18-24; Evans Paper at 42; *see also id.* at 20 n.43 (equating the "gatekeeper[]" term with "terminating access monopolies"). *But see Verizon v. FCC*, 740 F.3d 623, 663 n.7 (D.C. Cir. 2014) (Silberman, J., dissenting in part) (disputing the legitimacy of the latter term).

[39] AT&T Comments at 22 n.34; *see also* Lerner/Ordover Paper at ¶¶ 73-91 (explaining the inapplicability of the "gatekeeper" theory).

[40] Israel Declaration at ¶ 68.

[41] *Id.* (emphasis added).

> mechanism for the IXC to pass those costs back to the terminating LEC's customer. . . . These market characteristics are fundamentally different from the provision of broadband Internet access services. In contrast to market conditions in the provision of long-distance voice services, actions that a broadband provider takes with regard to an online content provider resonates back to the broadband access provider's own customers. That is, there is a direct "feedback loop" whereby imposing artificially high fees or unreasonable requirements on content providers would lower subscribers' demand for the network itself, creating incentives for current subscribers to switch to other providers and inhibiting the ability of the broadband provider to attract new customers.[42]

Moreover, as Professor Christopher Yoo and former FTC General Counsel Jonathan Nuechterlein have explained, even when it exists, "the terminating access monopoly phenomenon . . . does *not* itself generally threaten market failures except in very limited circumstances."[43]

This gatekeeper concept is especially ill-fitting as applied to interconnection, in which "the variety of paths into any broadband provider's network, combined with the ready availability of transit as an alternative to direct interconnection, keep[s] any broadband provider from exercising monopoly power over access to its customers."[44] The dramatic reduction in transit prices for Internet traffic in recent years, together with the multiplicity of routes into broadband providers' networks, confirms the absence of market failure.[45] In fact, Dr. Evans's gatekeeper analysis has the reality *backwards*. In the LEC/IXC context, a LEC does not depend on an IXC because the LEC can provide great service to its customers with alternative IXCs offering the same product. But in the broadband context, the edge providers that send enough traffic to impact interconnection—*e.g.*, Netflix, Google/YouTube, Facebook, and Amazon—are entities without which a broadband provider could not meet its customers' needs. In further contrast to the telephony model, these edge providers have independent relationships with many consumers, and they are not shy about advising their customers as to which broadband providers provide the fastest speeds.[46] And edge providers' ability to withhold content, which is *un*regulated, or to purposefully congest, more greatly impacts a broadband provider's service

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[42] Lerner/Ordover Paper at ¶¶ 15-16.

[43] Jonathan E. Nuechterlein & Christopher S. Yoo, *A Market-Oriented Analysis of the 'Terminating Access Monopoly' Concept*, 14 COLO. TECH. L.J. 21, 23 (2015) (emphasis added).

[44] Israel Declaration at ¶ 69.

[45] *See, e.g.*, Dom Robinson, STREAMING MEDIA, *CDN Market Pricing Down, but Overall Growth Continues*, May 22, 2017, *available at* http://www.streamingmediaglobal.com/Articles/ReadArticle.aspx?ArticleID=118381.

[46] *See* Netflix, "ISP Speed Index," *available at* https://ispspeedindex.netflix.com/; Google, "Video Quality Report," *available at* https://www.google.com/get/videoqualityreport/.

than *vice versa*.[47] In reality, then, the largest content providers have more "gatekeeper" attributes than do broadband providers. The frequently cited counter-examples, such as Netflix's interconnection disputes with some broadband providers,[48] hinge on debunked mischaracterizations.[49] As Comcast has explained, while supporters of this "gatekeeper" theory in the interconnection context often point to the supposed congestion of Netflix traffic at broadband interconnection points in 2013 and 2014, "it is edge providers like Netflix (or their agents) that decide how to route their traffic, and when congestion occurs, it is often attributable to those routing choices rather than to any [broadband provider] actions."[50]

### 2. Erroneous Arguments About Broadband Providers' Incentives

Based on these faulty assumptions about broadband market structure, Dr. Evans suggests that broadband providers have the ability and incentive to engage in anticompetitive conduct, including to "raise the costs" of OVDs, "increase the cost to their subscribers of using those services," and "impose vertical restraints on video programmers to reduce the supply of video programming to competing streaming video providers."[51] Once again, the record establishes the opposite. As Dr. Owen has explained, the idea that broadband providers would "find it profitable to exclude content they do not own or control" is "dead wrong."[52] That is because—as explained by Drs. Dennis Carlton and Bryan Keating—"content that attracts customers to the Internet *increases* the value of" a broadband provider's networks.[53] And marketplace experience reflecting the actual conduct of broadband providers—a better guide than Dr. Evans's theoretical musings—provides powerful confirmation of their incentive to *embrace* OVDs. Comcast, for example, has *enhanced* customer access to Netflix, YouTube, and Sling TV by arranging to make them available on the X1 platform.[54] Likewise, NBCUniversal has extensively licensed its

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[47] *See* David Clark *et al*., *Measurement and Analysis of Internet Interconnection and Congestion* 9 (Sept. 9, 2014), *available at* http://ssrn.com/abstract=2417573 (reflecting that congestion can depend on content providers who have the capacity to "instantly shift" traffic "from one path to another" while the broadband provider is powerless to respond).

[48] *See* Evans Paper at 45.

[49] *See, e.g.*, Opposition to Petitions to Deny and Response to Comments of Comcast Corp. and Time Warner Cable Inc., MB Docket No. 14-57, at 148-49, 209-11, (filed Sept. 23, 2014) ("Comcast-TWC Opposition"); Declaration of Kevin McElearney ¶¶ 3, 23-24, attached as Exhibit 4 to Comcast-TWC Opposition (filed Sept. 23, 2014) (explaining that "traffic delivery decisions of Netflix," and not any anti-competitive act by Comcast, were responsible for these disputes).

[50] Reply Comments of Comcast Corp., WC Docket No. 17-108, at 36 (filed Aug. 30, 2017).

[51] Evans Paper at 5; *see also id.* at 50-61.

[52] Owen Paper at 2-3.

[53] Dennis W. Carlton and Bryan Keating, *An Economic Framework for Evaluating the Effects of Regulation on Investment and Innovation in Internet-Related Services*, 21, attached to Comments of CALINNOVATES, WC Docket No. 17-708 (filed July 16, 2017).

[54] Comcast Corp., Comcast to Launch Netflix on X1 to Customers Nationwide, Press Release (Nov. 4, 2016), http://corporate.comcast.com/news-information/news-feed/comcast-to-launch-netflix-on-x1-to-millions-of-customers-nationwide; Comcast Corp., Comcast to Launch YouTube on Xfinity X1, Press

content to these and other OVDs, including Hulu and Sony's Playstation Vue.[55] This cooperative, pro-competitive approach is reflected in many OVDs' extraordinary recent successes; Netflix, for example, has over 50 million subscribers in the United States,[56] a figure that dwarfs all other MVPDs' subscriber counts.[57] In short, marketplace realities show that Dr. Evans's theory about broadband providers' incentives is wrong.

And these marketplace realities make perfect sense. A broadband provider's business model depends on providing unimpeded access to all lawful Internet content; blocking or throttling reduces the value of its service and would not be profitable.[58] Indeed, OVDs and other high-bandwidth edge services are important complements to broadband that enhance the value of a broadband provider's service for its broadband customers and help drive customers' willingness to upgrade to higher tiers of service. Several broadband providers have made exactly this point throughout this proceeding.[59] And, for similar reasons, the unfounded theory that a

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Release (Feb. 27, 2017), http://corporate.comcast.com/news-information/news-feed/comcast-to-launch-youtube-on-xfinity-x1; Comcast Corp., Comcast Boosts Multicultural Programming with the Launch of Sling TV on X1, Press Release (Nov. 22, 2016), http://corporate.comcast.com/news-information/news-feed/sling-tv-to-launch-on-comcast-x1-platform.

[55] Sarah Perez, *Hulu Scores Deal with NBCU for its Live TV Service, Will Now Carry All Four Major Broadcast Networks*, TECHCRUNCH, May 1, 2017, *available at* https://techcrunch.com/2017/05/01/hulu-scores-deal-with-nbcu-for-its-live-tv-service-will-now-carry-all-four-major-broadcast-networks/; PlayStation, "Playstation™ Vue Launches Today, Revolutionizing Television Viewing," Mar. 18, 2015, *available at* https://www.playstation.com/en-us/corporate/press-releases/2015/playstation-vue-launches-today-revolutionizing-television-viewing/.

[56] *See* NETFLIX, Shareholder Letter 10 (Apr. 17, 2017), *available at* http://goo.gl/guWYft.

[57] *See, e.g.*, Tom Huddleston, Jr., *Netflix Has More U.S. Subscribers Than Cable TV*, FORTUNE, June 15, 2017, *available at* http://fortune.com/2017/06/15/netflix-more-subscribers-than-cable/ (observing that Netflix "now has more U.S. streaming subscribers (50.85 million) than the number of customers for the country's largest cable companies"). Amazon Prime Video has experienced similar growth, with over *80 million* Prime memberships. *See* Stephanie Pandolph & Jonathan Camhi, *Amazon Prime Subscribers Hit 80 Million*, BUSINESS INSIDER, Apr. 27, 2017, *available at* http://www.businessinsider.com/amazon-prime-subscribers-hit-80-million-2017-4. And the entry of massive competitors like Google/YouTube into this arena further confirms that broadband providers are not foreclosing competitive opportunities. *See, e.g.*, Michelle Castillo, *YouTube Announces Cable-Free TV Subscription Service*, CNBC, Feb. 28, 2017, *available at* https://www.cnbc.com/2017/02/28/youtube-announces-skinny-tv-bundle-.html.

[58] Dippon White Paper at 17-18 ("B[roadband] providers have learned that providing excellent Internet access service is their comparative advantage—including ubiquitous access to third-party content and services. Further, the better they do it, the more money they will make."); Owen Paper at 3 (impairing delivery of any content would "harm[] the [broadband provider's] customers" thus "reduc[ing] the [broadband provider's] profits . . . . This is true even if there are no other providers in the market").

[59] *See, e.g.*, NCTA Comments at 51 ("[I]t would be irrational for [broadband providers] to undermine the very openness that has long buoyed their business for some short-term gain."); Verizon Comments at 5 ("We have invested billions of dollars in businesses that rely on the open Internet, which our customers view as essential and which is therefore a critical ingredient to our success."); Comments of Frontier Communications Corp., WC Docket No. 17-708, at 6 (filed July 17, 2017) ("Frontier does not have any interest in favoring certain Internet content . . . . Indeed, the combination of competition in the broadband

broadband provider would degrade its broadband service in order to prop up affiliated video content or MVPD services is irrational. Because it is more profitable for cable operators to offer broadband than subscription video services (given the high costs of acquiring video programming), it would be self-defeating to undermine the value of broadband by blocking lawful content in order to prop up traditional video offerings.[60]

More generally, the largest broadband providers have demonstrated throughout this proceeding their clear commitments to their customers regarding Internet openness and that their customers expect them to honor those commitments.[61] There is no basis to conclude that, after openly making these firm commitments to their customers and the public, any of these companies would turn their back on these pledges for "short-term gain."[62] Even the judges who upheld the prior Commission's decision to impose Title II regulation recognized that a broadband provider that "filter[s] its customers' access to web content based on its own priorities might have serious concerns about its ability to attract subscribers."[63] And engaging in outright anticompetitive conduct would be commercially devastating, as consumers plainly would not stand for it and would quickly turn to rival providers that uphold principles of openness.[64] Given broadband providers' strong interest in meeting the needs of their customers, it is hardly

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market and consumer expectations would significantly discipline any company that sought to micromanage a user's content.").

[60] *See, e.g.*, Bryan Kraft & Clay Griffin, DEUTSCHE BANK MARKETS RESEARCH, *The Power of the Pipe* 4 (July 13, 2015) (stating broadband providers "earn profits selling network access (i.e. broadband), not pay TV"); *see also* Remarks of Chairman Tom Wheeler, 2014 NCTA Cable Show, at 3 (Apr. 30, 2014), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0430/DOC-326852A1.pdf (stating that the cable industry's "principal business . . . has become, and will continue to be, broadband").

[61] *See, e.g.*, Comcast Comments at 2 ("Comcast's business practices reflect th[is] commitment and ensure those protections for its customers, and will continue to do so no matter how the Commission proceeds.") (quoting blog post of Chairman and CEO Brian L. Roberts); Comments of Charter Communications, WC Docket No. 17-708, at 1-2 (July 17, 2017) ("Charter is firmly committed to an open internet" and has "long put the principles of an open internet into practice."); Comments of Cox Communications, Inc., WC Docket No. 17-708, at 1 (July 17, 2017) (pledging "[r]egardless of any regulatory requirements" to "continue to provide unimpeded access to all of the Internet content and services that its customers desire"); AT&T Comments at 1 (noting that AT&T has consistently supported open Internet principles and will continue to "conduct [its] business in a manner consistent with an open Internet" because its "customers demand no less"); Verizon Comments at 1 (confirming that Verizon is "committed to an open Internet," meaning that "consumers should be able to access the legal content of their choice when and how they want . . . [a]nd providers (network and edge alike) should be able to continue to expand and grow their networks, services, and technologies without fear of being cut short or held back by either unnecessary regulation or by the anticompetitive practices of anyone in the Internet ecosystem").

[62] NCTA Comments at 51.

[63] *USTelecom v. FCC*, 855 F.3d 381, 390 (D.C. Cir. 2017) (Srinivasan, J., joined by Tatel, J., concurring in the denial of rehearing en banc).

[64] *See, e.g.*, Israel Declaration at ¶ 51 (explaining that "anti-consumer actions by Internet providers would lead to substantial costs in the form of consumer departures"); Reply Comments of NCTA – The Internet & Television Association, WC Docket No. 17-108, at 27 (filed Aug. 30, 2017).

surprising that real-world evidence of harmful conduct over the past two decades is virtually non-existent.[65]

### 3. Erroneous Claims About Administrative Law

Finally, INCOMPAS appears to be using Dr. Evans's paper to argue that any decision that results in the elimination of Title II regulation would violate the Administrative Procedure Act ("APA"), in light of the supposed "evidence" that broadband providers have an ability and incentive to harm Internet openness.[66] But the foregoing makes plain that Dr. Evans's paper poses no hurdle to restoring a Title I classification for broadband. As an initial matter, the record evidence demonstrates that broadband providers do *not* have an ability or incentive to harm Internet openness, particularly in light of the competitive characteristics of today's marketplace. Reaching that conclusion would not, as INCOMPAS suggests, require the Commission to rely only on "self-interested commentators and disputed studies from just one side."[67] Rather, the Commission has broad discretion to weigh the materials submitted by both sides and make factual findings accordingly.[68]

More fundamentally, the Commission can use its "predictive judgment" to decide that a Title II backstop is unnecessary to safeguard the Internet and promote investment and innovation, as it did for nearly two decades before the *Title II Order*.[69] Among other things, although Dr. Evans is overstating any plausible harms, the Commission has effective non-Title II

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[65] *See Verizon*, 740 F.3d at 664-65 (Silberman, J., dissenting in part) ("That the Commission was able to locate only four potential examples of such conduct is, frankly, astonishing. In such a large industry . . . one would think there should be ample examples of just about any type of conduct."); *see also, e.g.*, AT&T Comments at 15-19 (demonstrating that predictions of doom in the absence of heavy-handed proved wildly inaccurate); *id.* at 19-21 (explaining that the "historical record … is not only devoid of any *systematic* market failure requiring a prescriptive regulatory response, but also devoid of any *individual instances* in which [broadband providers] have engaged in conduct that could even logically justify regulatory intervention beyond core prohibitions on unjustified blocking and throttling," and debunking supposed instances of misconduct (emphasis in original)).

[66] *See* INCOMPAS Reply Comments at 4-5.

[67] *Id.* at 8.

[68] The courts' role here is "limited": it is "to ensure that [the agency] engaged in reasoned decisionmaking—that it weighed competing views, selected [an approach] with adequate support in the record, and intelligibly explained the reasons for making that decision." *FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 784 (2016). Whereas the *Title II Order* was grounded in speculative assertions that lacked substantial evidentiary support, the record before the Commission in this proceeding amply supports the conclusion that Title II suppresses investment and innovation while failing to deliver meaningful benefits.

[69] *See Earthlink v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006) (holding that an "agency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to *particularly deferential* review" (emphasis in original)).

options to address any harms should they arise.[70] Lastly, with regard to certain of the agency's past economic findings, the Commission need only provide "a reasoned explanation" for departing from earlier factual findings underlying those conclusions.[71] The Commission plainly can do so in this proceeding in light of strong criticism of those factual findings at the time they were made, as well as a robust new record and current marketplace evidence, all of which squarely rebut such prior findings and the incorrect claims of INCOMPAS and Dr. Evans.

Respectfully submitted,

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[70] *See, e.g.*, NCTA Comments at 54-59 (explaining how the Commission may establish a regime of FTC enforcement with its own, non-Title II authority as a backstop).

[71] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009). Moreover, in contrast to the substantial reliance interests deliberately engendered by the Commission's longstanding adherence to an information service classification and light-touch regulatory framework, there can be no credible claim of reliance on the Commission's recent and contested assertions that broadband providers' purported incentives to act anticompetitively warrant the imposition of common carrier regulation.